

THE BOTTOM LINE

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OUTSOURCING OF U.S. LAWYERS: ETHICAL AND BUSINESS ASPECTS

By Ernest Schaal



Ernest Schaal

**MCLE
ETHICS**

One of the hot political issues this year is the movement of American jobs to other countries. Kerry has blamed Bush for coddling “Benedict Arnold CEOs,” who he says are abusing U.S. tax laws and shipping jobs overseas.¹

Outsourcing of jobs overseas is not a recent phenomenon. As early as the 1970s and 1980s manufacturing jobs moved overseas, but now service jobs have also moved overseas, including some legal-related jobs. This article will focus on the feasibility of moving legal-related jobs overseas, and the associated problems of that move, instead of focusing on the political pros and cons of outsourcing generally.

According to a UC Berkeley study,² some of the jobs most vulnerable to the new wave of outsourcing include online legal database research and other “back office” activities. Quoting from a UC Berkeley press release: “Altogether, the positions feature vulnerability-producing attributes such as a lack of face-to-face customer service, work processes that

enable telecommuting and Internet work, high wage differentials between countries, a high information content, low social networking requirements, and low set-up costs.”

The high wage differential alone makes some jobs particularly vulnerable to outsourcing. For instance, between 2002 and 2003, legal assistants and paralegals in India made \$6 to \$8 per hour, which is between two and three times lower than the U.S. average of \$17.86.³

The migration of legal-related jobs has begun, but involves a minimal share of the legal market. West Publishing has a test office in India, where Indian lawyers have been doing online interpretation and legal-classification of “unpublished decisions” of U.S. state and lower courts.⁴ In addition, Mindcrest (a Chicago-based outsourcing firm) has an Indian subsidiary handling some basic research and low-rung work that would otherwise have been done by paralegals and junior lawyers.⁵

In addition, some large corporations are having foreign lawyers prepare documents for review by

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FROM THE CHAIR



Carole Levitt

Too Many Chairs?

As I began to draft my "Letter from the Chair," the word "Chair" jumped out at me and reminded me of every chair of every airplane, automobile, bus and subway that I recently sat in as I traveled to six cities in three weeks to give eight seminars. My travels took me from New York City to Atlanta to Chicago to Springfield (Illinois) and various places in between. How nice it is to finally be sitting comfortably in my own office chair writing the "Letter from the Chair"!

ABA LPM Tech Show

The part of my trip most relevant to the LPMT Section was Chicago because that's where the ABA LPM Section's annual Tech Show was being held. Besides getting to attend my first Tech Show ever, Mark Rosch (our Section's Website content writer and Vice-President of Internet For Lawyers) and I were invited to speak on a panel titled, "Mining the Net For Gold."

While everyone was buzzing about blogging and attending one electronic discovery seminar after another, we attended seminars on other topics, such as:

"Wireless Security-Wardriving, Warchalking and other Wireless Woes" (There is no such thing as wireless security, by the way).

"The Lawyer's Guide to Adobe Acrobat"

"My Favorite Utilities" (Gas, water and electricity were not mentioned but one of my favorite utilities was: tinyurl.com, which can be used if you ever need to shorten a long, long url).

Alternatives for Effective Training (Some law firms use a "Survivor" theme for training sessions while others use a "Golf" theme).

The PowerPoint Presentations of all the seminars at the Tech Show are supposed to be posted on the ABA website. I'll provide the

URL in the next "Letter From the Chair" or you can visit www.abanet.org/lpm to find out if the presentations are posted.

Law-Tech and Practice Management Gurus at the ABA Tech Show

We also had a chance to meet, in-person, many of the Law-Tech and Practice Management gurus whom we had "met" only over the Internet. Almost all of them have blogs and their URLs are listed below in case you want to see what all the blogging is about:

Co-authors of one of the earlier Internet legal research books: "Law, Law, Law on the Internet" (1998): Erik Heels (see his blog at www.lawlawlaw.com/) and Richard Klau (see his blog at www.rklau.com/tins).

Ernie the Attorney a.k.a. Ernest Svenson (see his blog at www.ernietheattorney.net/).

Dennis Kennedy, who wrote the legal technology column for Lawyers Weekly USA from 1996 to 1999 (see his blog at www.denniskennedy.com/blog/).

Joe Kashi, an attorney living in Soldotna, Alaska who is a technology editor for ABA LPM's Law Practice Today.

You know you are dealing with law techies when you learn:

- that Kashi and Heels both graduated from MIT and then went to law school.
- that everyone, well almost everyone, has a blog (as noted above).

Parties at the ABA Tech Show

And, of course there were parties. First there was "The Dinner" which was a tribute to law tech consultants. It was held at the Museum of Contemporary Art and featured a menu by Wolfgang Puck. Then, there was the "Friends of LPM" dinner held at a Tapas restaurant. Many of the "friends" turned out

to be ABA LPM authors—past and present. The newest authors are all part of the ABA LPM's "The Lawyer's Guide to" series (www.abanet.org/lpm/):

The Lawyer's Guide to Fact Finding on the Internet, by Carole Levitt and Mark Rosch
The Lawyer's Guide to Palm Powered Handhelds, by Margaret Spencer Dixon
The Lawyer's Guide to Extranets, by Douglas Simpson and Mark Tamminga
The Lawyer's Guide to Adobe Acrobat, by David Masters

The California State Bar LPMT Section Also Has Law-Tech and Practice Management Gurus

The California State Bar LPMT section also has law practice management and technology gurus. They'll be showcased on September 9, 2004 and October 7-10, 2004.

Can't wait until next March to attend the ABA Tech Show? On September 9, 2004, LPMT is sponsoring an all-day Law Practice Management & Technology seminar in Fresno. As the title suggests, the seminar will offer topics on law practice management and technology and will also offer some of the "hard to get" required topics—Legal Ethics and Substance Abuse (and possibly even Elimination of Bias). Mark your calendar and keep an eye out for more information.

On October 7-10, 2004, LPMT is sponsoring THIRTEEN seminars at the State Bar of California's Annual Meeting to be held in Monterey.

The California State Bar LPMT Section Also Has Authors!

Besides being prolific authors of articles (for the Section's newsletter, *The Bottom Line*, and many other publications), our Executive Committee abounds with book authors. Two of our newest authors are:

Henry Dahut, who wrote *Marketing The Legal Mind—Turning New Perspectives into Powerful Opportunities* (www.bookmasters.com/marktplc/01128.htm)

Mary Helen Rich, who contributed to CEB's 2004 *Handling Subpoenas Action Guide* (<http://tinyurl.com/2fx3t>)

One of our most veteran (and prolific) authors is Ed Poll (<http://tinyurl.com/3du8r>), who wrote:

Collecting Your Fee: Getting Paid from Intake to Invoice
Attorney & Law Firm Guide to The Business of Law: Planning and Operating for Survival and Growth, Second Edition
Secrets of the Business of Law: Successful Practices for Increasing Your Profits!
The Profitable Law Office Handbook: Attorney's Guide to Successful Business Planning
The Tool Kit for Buying or Selling a Law Practice

Carol Langford co-authored two books:

Legal Ethics in the Practice of Law (<http://tinyurl.com/2hght>)
The Moral Compass of the American Lawyer: Truth, Justice, Power, and Greed (<http://tinyurl.com/2atcs>)

Robert Kohn co-authored a chapter in: *The Complete Guide to Marketing your Law Practice* (<http://tinyurl.com/2bnlo>)

Finally, Russell Jackman and Alex Lubarsky are currently writing a book together on the subject of electronic discovery.

The California State Bar LPMT Section Also Knows How to Party!

Mark your calendar for the LPMT Section's Cocktail Party to be held at the Annual Meeting on Saturday, October 9, 2004, from 5:30 p.m. to 7:00 p.m. The Executive Committee looks forward to meeting all Section members!

Best regards,

Carole Levitt
 Chair, LPMT

Carole Levitt is President of Internet For Lawyers (IFL) and Chair of the LPMT Executive Board. She teaches attorneys how to use the Internet for research and for marketing. For more information about IFL and a list of MCLE seminars, see www.netforlawyers.com. Carole Levitt welcomes your phone calls (310-559-2247) or emails (clevitt@netforlawyers.com).

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MCLE ETHICS

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in-house attorneys. For instance, General Electric has trained lawyers in India to write basic contracts that the company's lawyers in the United States then review.⁶

While some legal-related work is being out-sourced, that doesn't mean that all legal work is equally vulnerable. The market research firm Forrester Research has predicted that only about eight percent of the total of U.S. lawyer jobs will shift to lower-cost countries by 2015.⁷

This is because not all legal-related work lacks face-to-face customer service, has work processes that enable telecommuting and Internet work, or has low social networking requirements. For instance, litigation usually requires in-person court appearances. Furthermore, several types of legal-related work is best performed face-to-face, such as counseling a family law client. As for the rainmaking role of a lawyer for his/her firm, that has high social networking requirements.

Even in the areas of online legal database research and other "back office" activities of law offices, one obstacle to outsourcing is the differences in the legal systems involved. Although India uses a common law legal system, that system is based on the British common law, not American common law. Significant differences exist, and Indian lawyers doing U.S. work need special training in American law and American legal trends. The company that is doing the outsourcing often has to do this training. West Publishing, for instance, not only brings Indian lawyers into the States for in-house training, but also sends trainers to Bombay.

In addition, some aspects of outsourcing legal functions raise ethical problems due to the use of people not licensed by the state.

For instance, Rule 1-300(a) of the Rules of Professional Conduct states "A member shall not aid
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any person or entity in the unauthorized practice of law.” Thus, a member of our bar has to consider whether the use of outsourcing of legal work is aiding in the “unauthorized practice of law.”

In addition, Section 6126 (Unauthorized Practice or Advertising as a Misdemeanor) of the Business & Professions Code makes it a misdemeanor for someone who is not an active member of the State Bar to advertise or hold oneself as practicing or entitled to practice law or otherwise practice law.

California courts have repeatedly defined “practice of law” as meaning “doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court.”⁸

This definition of “practice of law” appears to be sufficiently broad enough to cause concerns when American legal work is done overseas. Because of this concern, American lawyers need to review—and bear responsibility for—the final product.⁹ According to legal ethics expert Stephen Gillers, “There is no problem with offshoring, because even though the lawyer in India is not authorized by an American state to practice law, the review by American lawyers sanitizes the process.”¹⁰

Therefore, the Indian lawyers function as glorified paralegals, who are supervised by U.S. attorneys. That supervision is done from considerable distances involving radically different time zones, which requires good management skills. In addition, the problems of having to train the foreign lawyers in U.S. law and the requirement that U.S. lawyers review that work means that many companies do not have the support staff required to outsource American legal work to foreign lawyers.

An additional obstacle to outsourcing legal work could result from a recently reported incident involving a medical transcription subcontractor in Karachi. The subcontractor threatened to post confidential patient records of the UC San Francisco Medical Center on the Internet unless UCSF helped her get the money she was owed from a middleman. Because of this incident, legislation has been introduced that would prevent any work from being sent abroad if it involves state residents’ confiden-

tial information.¹¹ If enacted, this legislation could restrict outsourcing legal work overseas, since most legal work involves confidential information.

Even without such legislation, one of the duties of an attorney required by Section 6068(e) of the Business & Professions Code is to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Therefore, a lawyer involved in outsourcing legal work needs to have safeguards in place that assure that the confidentiality of information sent overseas is preserved. While this is possible, it is not necessarily easy.

In summary, while the high wage differentials between countries for legal work is an incentive for outsourcing legal work, other factors reduce the practicality of such outsourcing. Such factors include the need to train foreign lawyers in U.S. law, the need for U.S. attorneys to review all work and take final responsibility for it, and the need to assure that client confidences are maintained inviolate.

Ernest Schaal is a patent attorney working in Gifu Japan for ONDA TECHNO Intel. Patent Attys. He is presently a special advisor to the Law Practice Management & Technology Section of the State Bar of California.

1 Barrie McKenna, “China has become the latest whipping boy in U.S.,” *The Globe and Mail*, 19 March 2004, p B5.

2 Kathleen Maclay, “UC Berkeley study assesses ‘second wave’ of outsourcing U.S. jobs,” Press release UC Berkeley, October 29, 2003.

3 *Id.*

4 “On business: Outsourcing hits legal services,” *Star Tribune*, January 16, 2004.

5 “On business: Outsourcing hits legal services” and “Corporate America Sending More Legal Work to Bombay,” *The New York Times*, March 14, 2004.

6 “Corporate America Sending More Legal Work to Bombay.”

7 “On business: Outsourcing hits legal services.”

8 See *People v. Merchants Protective Corp.* (1922), 189 Cal. 531, 535 [209 P. 363]; *State Bar v. Superior Court* (1929), 207 Cal. 323, 335 [278 P. 432]; *Smallberg v. State Bar* (1931), 212 Cal. 113, 119 [297 P. 916]; *Gray v. Justice’s Court* (1937), 18 Cal.App.2d 420 [63 P.2d 1160].

9 “Corporate America Sending More Legal Work to Bombay.”

10 “Corporate America Sending More Legal Work to Bombay.”

11 David Lazarus, “Looking Offshore: Outsourced UCSF notes highlight privacy risk. How one offshore worker sent tremor through medical system,” *San Francisco Chronicle*, March 28, 2004.

MCLE ETHICS

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QUESTIONS: OUTSOURCING

MCLE ETHICS

1. One of the hot political issues this year is the movement of American factory jobs and white-collar work to other countries.

True False

2. The movement of American jobs to other countries is a recent phenomenon.

True False

3. According to a UC Berkeley study, legal online database research and other "back office" activities are some of the jobs most vulnerable to the new wave of outsourcing.

True False

4. According to a UC Berkeley study, the positions most vulnerable to outsourcing feature vulnerability-producing attributes such as a lack of face-to-face customer service, work processes that enable telecommuting and Internet work, high wage differentials between countries, a high information content, low social networking requirements, and low set-up costs.

True False

5. In 2002-2003, legal assistants and paralegals in India made less than one tenth of the hourly wages of legal assistants and paralegals in the United States.

True False

6. According to news stories, in a test office in India, Indian lawyers have been doing online interpretation and legal-classification of "unpublished decisions" of U.S. state and lower courts.

True False

7. So far there have been no reports of outsourcing of basic research and low-rung work for U.S. corporations and law firms usually done by paralegals or junior lawyers.

True False

8. General Electric has trained lawyers in India to write basic contracts that the company's lawyers in the United States then review.

True False

9. The market research firm Forrester Research has predicted that at least 25 percent of the total of U.S. lawyer jobs will shift to lower-cost countries by 2015.

True False

10. All aspects of legal-related work share the same vulnerabilities to being outsourced.

True False

11. One obstacle to outsourcing of legal work to India is that the Indian lawyers need to be trained in the differences between the Indian legal system they learned in law school and the U.S. legal system of the outsourcing client. Sometimes the company that is outsourcing the work does this training.

True False

12. According to the California Rules of Professional Conduct, a member of the California bar has an obligation not to aid any person or entity in the unauthorized practice of law.

True False

13. Section 6126 of the Business & Professions Code makes it a felony for someone who is not an active member of the State Bar to advertise or hold oneself as practicing or entitled to practice law.

True False

14. The practice of law includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such a matter may or may not be pending in a court.

True False

15. When any American legal work is done overseas, American lawyers should review—and bear responsibility for—the final product.

True False

16. According to one legal ethics expert, a review by American lawyers sanitizes the process so that there is no ethical problem with outsourcing the work to Indian lawyers.

True False

17. Many companies do not have the support staff required to outsource American legal work to foreign lawyers.

True False

18. An additional obstacle to outsourcing legal work could result from a recently reported incident involving the threat to disclose confidential information on the Internet.

True False

19. One of the duties of an attorney is to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

True False

20. While the high wage differentials between countries for legal work is an incentive for outsourcing legal work, other factors reduce the practicality of such outsourcing.

True False